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ABSTRACT

The responsibility for education in Australia rests with the states. Teachers in the state of New South Wales, as in other Australian states, are employed by the Public Service Board, which determines working conditions. Teachers are administered, however, under the Department of Education. Labor disputes in Australia are settled not by formal negotiations but by compulsory arbitration by state and federal arbitration commissions. Nevertheless Australian teacher unions and other unions often strike, especially over grievances. There are several advantages of the system of compulsory arbitration. It promotes speedy settlement and national uniformity of wages and working conditions. Its penal sanctions also reduce the loss from long work stoppages. One disadvantage is that the system lacks formal means for resolving grievances. Under the system, teachers' salaries in New South Wales and throughout Australia have increased dramatically. One big problem, however, is that teachers and principals share the same union but do not always have the same interests. It is proposed that the split between teacher administration and hiring be remedied by the institution of a commissions employment agency handling both functions as well as representing management in labor disputes. Australia also might benefit from more formal provisions for collective negotiations. (Author/JM)

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COMPULSORY ARBITRATION AND CONCILIATION IN AUSTRALIA

by
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Introduction

In this paper, attention will be given to several related items: a brief overview of the structure and governance of education in New South Wales (N.S.W.); a brief history of compulsory arbitration and conciliation; some contrasts between compulsory arbitration and collective bargaining; some prospective changes in governance which will impact on the N.S.W. labor relations system and some speculations about the future of labor relations in N.S.W. and Australia.

Governance of N.S.W. Education

The responsibility for education in Australia rests with the states. The federal constitution precludes federal involvement in education; that preclusion is not as firm as strict constitutionalists might like. Nevertheless, the systems of education are state systems. Among the Australian states, the educational systems are more alike than different.

Much of the focus of this discussion is on the state of N.S.W., the most populous of all Australian states, with the largest Teachers' Federation. Much of what is said about N.S.W. can be said about other states as well. The differences among the states are not great enough to cause concern in the interpretation of this paper.

Teachers in N.S.W. are viewed as public servants. They are employed by the N.S.W. Public Service Board. All financial aspects of their working conditions are "negotiated" with the Board. Teachers are administered, however, by a highly centralized bureaucracy which is separated by function and purpose from the Public Service Board. This separation

EA 011 141

of employing agency and administrating agency is a subject of debate and will be referred to later. The peak of the bureaucracy is in the position of the Minister of Education, a cabinet position filled from the ranks of parliament. The Minister of Education has ultimate authority for policy-making in response to the various forces which impinge on him. The implementation of policy rests with the Director-General (comparable to a state superintendent) of schools, appointed by the Minister. The Director has a staff of administrators under his control, a few of whom, in N.S.W., are dispersed in "regional" offices. Such "devolution" of responsibility is a recent phenomenon: the amount of authority delegated to regional administrators appears to be minimal. All major decisions, such as hiring, assigning, promoting, are made by the Public Service Board or the Department of Education.

Once hired, a teacher in N.S.W. is assigned and reassigned by the Department. The promotion route is one familiar in America: Teacher-subject master (department chairperson)-deputy principal-principal. The school principal is charged with the administration of the local school according to the direction of the Department. His career hangs on the perceptions of how well he has done his job as seen by departmental superiors.

The funding of education in Australia is highly centralized; there is no formal provision for local funding. "Unlike the U.S. or Canada, there is no local control of education at all, nor is there any direct local taxation for educational purposes."[1]

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[1]Harmon, G, "The Politics of Education," Social Science Perspectives on Australian Education, eds. R. Brown and W. Simkins (Macmillan, 1972), p. 145.

History of Compulsory Arbitration and Conciliation

By about 1980, labor unrest was so marked in Australia that the government was moved to provide mechanisms for dealing with it. There were two primary motivating forces: (1) to avoid the negative economic effects of strikes and (2) to provide for a "rule of law" rather than a rule by men. As a result of such forces, the Australian system of compulsory arbitration and conciliation was instituted. In simple terms, the law required that disputes over wages and other "working conditions" be submitted to legally designated officials who had the authority and obligation to resolve the cases in dispute. Both parties were expected to abide by the provisions of the arbitrated award. An award was not enforceable as a contract, under contract law; rather, it was enforceable within the system of arbitration itself.

At the federal level, an Arbitration Commission was established to arbitrate awards. The Commission has a great deal of power; it is not restricted to claims or demands of the parties; it can include items in awards which are intended to prevent further disputes; it can include items in awards which the Commission believes will enhance settlement of a dispute. A Board of Reference to deal with disputes arising within the award may be provided in the award; they are not universally provided. A Board of Reference is one of two available ways to deal with "grievances." The second way is within a provision called "Part X" agreements, which, in effect, provide for grievance resolution procedures. Very few employers and employee groups include "Part X" agreements in their labor relations procedures.

Australian labor relations are complicated by the fact that there are two systems: federal and state. The federal system is restricted

to those cases where the dispute crossed state lines. But, state unions are permitted to register with the federal system. For example, the New South Wales Teachers Federation (N.S.W.T.F.) is a registered union with the federal system even though awards are processed through the N.S.W. system of arbitration and conciliation.

Further complications in the system are best represented by the comments of an industrial relations authority:

> There is a clear separation in { the federal system } between arbitral { award making } and judicial { award interpretation and enforcement } functions. The arbitral function is administered by the Commonwealth Conciliation and Arbitration Commission. { Commission members } . . . are concerned with matters involving the public interest--the . . . total wage, standard hours of work and long service leave and all matters deemed . . . to involve the public interest. . . . The judicial function . . . is administered by the Commonwealth Industrial Court. . . . It is concerned with such matters as the interpretation of awards, determining questions of law . . . matters relating to the government and administration of unions, and questions involving breaches of awards and enforcement of awards.[2]

Over the years, and in spite of changing conditions, little change has been made in the legislation for arbitration. Changing conditions have, however, brought about a number of practices which seem to have been adopted in spite of no supporting legislation, i.e., "over-award" payments, or payments to employees which exceed the wages stipulated in an award. One additional factor needs to be noted: there is no clear distinction made between public and private sector labor relations; public sector unions are covered by the same legislative provisions as are private sector unions. Even though the N.S.W.T.F. "negotiates" working conditions with the Public Service Board, it has access to the N.S.W.

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[2] Isaac, J., Compulsory Arbitration in Australia (Ottawa, 1968), Study No. 4, Task Force on Labour Relations, pp. 71, 72.

Industrial Commission as private sector unions do. It is in the context of such a system that educators find themselves.

Contrasts Between Compulsory Arbitration and Collective Negotiations

With a history of over eighty years, the appropriateness of compulsory arbitration and conciliation seems well established in the minds of the Australian people. By contrast, arbitration at the "interest" level is seen as quite inappropriate in the U.S. Similarly, rights arbitration is a common practice in the U S.; rights arbitration in Australia is either absent or so awkwardly structured that it is less useful than conditions appear to demand. In spite of the fact that grievance procedures are permissible under "Part X" of the labor relations legislation, they are seldom included in formal awards. Without other avenues for resolving "grievance" type disputes, employees in Australia tend to "sweat out" the protracted processes of conciliation through the courts or to vent their displeasure through a limited strike. Hence, strikes are common in Australia, events the system was imposed to prevent, just as legal prohibitions of strikes in the U.S. have failed to prevent strikes here.

By the admission of many authorities in Australia, there are industrial relations problems which require more than the system has to offer, and there are problems which require less than the system imposes.

Four positive aspects of the system are cited:

1. The institution of conciliation and arbitration has provided, early in the history of industrial relations {note the use of early} a device for a speedy settlement of industrial disputes of all kinds, in private and in public employment.

2. The pervasiveness of compulsory arbitration in the economy has produced a greater degree of uniformity in the standards of wages and working conditions than might be expected to prevail in a country with such a wide geographical spread and diversity of union size and power.
3. In giving registered unions legal status and security, it removed much industrial unrest associated with union organizational drives and established the basis for stable unions.
4. The existence of penal sanctions, particularly when used discriminately, has reduced the loss from long drawn-out stoppages and has often provided the means for strengthening the hand of union leadership against fruitless strike action.[3]

Whereas the system of compulsory arbitration in Australia may have evidenced all the advantages to which Isaac refers in the past, an observer of the present scene might well question the positive impact of the system in a more complex, more industrialized and more pluralistic society than was the case prior to World War I.

In contrast to the assumptions which can be implied from Isaac's comments above, assumptions underlying a system of collective bargaining are enumerated by an Australian:

1. Settlement is sought through direct negotiation, unless both parties agree to involve a neutral arbitrator, and to accept his decision.
2. There is uncertainty as to the outcome of the conflict.
3. The parties have a philosophical commitment to direct negotiation, and approach the negotiation in good faith.
4. Where disagreement continues, the parties themselves determine how to resolve the impasse, at least until public welfare becomes an issue.[4]

Given the contrast between collective bargaining and compulsory arbitration, it is interesting to note that among the things which the U.S. and

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[3] Ibid., p. 37.

[4] Huntley, P., Inside Australia's Top Trade Unions (Huntley Pty Ltd., 1976), p. xxix.

Australia hold in common is the prevalence of legalism and lawyers. Isaac points to the ". . . tendency for legalistic points to crop up in matters of procedure and jurisdiction. This, in turn, has led to the dominance of legally trained men among those who make up the tribunals . . . and the frequent presence of lawyers in industrial relations."[5]

In more explicit criticism of the "legal involvement," Huntley notes several consequences:

1. The legal presence has caused proceedings to become formal and complex.
2. The legal framework induces the industrial parties to adopt antagonistic postures that unduly exaggerate the natural level of conflict. It also lifts the language well above that of the shop floor, where it all started.
3. Legalism causes a strong tendency to view industrial issues in too simplistic terms--that of right and wrong, for instance. This is also leading to under-emphasis on psychological, sociological and organizational considerations.
4. Legal proceedings are notoriously costly. In many cases senior barristers are retained at considerable expense by one side to handle a case with what turns out to be no greater expertise than that displayed by the non-legal advocate on the other side.
5. It is not in the mentality of a legally dominated system to accommodate productivity bargaining or other processes for revising work rules in line with changing conditions.
6. Where legally based arbitration proceedings are likely, each party is more inclined to save its "best effort" until then--wrongly directing emphasis away from shop floor resolution.[6]

One can suggest the possibility that legislatures in Australia, as is the case in the U.S., are made up of legislators who have had legal

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[5]Isaac, Compulsory Arbitration in Australia, pp. 4, 6.

[6]Huntley, Inside Australia's Top Trade Unions, p. xxix.

training. ". . . from 55 to 60 percent {of congressmen} have had a legal background."[7] That may explain, in part, the complex nature and language of legislative law. And, one might add, the complexity of laws, in turn, may provide employment opportunities for lawyers.

Another notable difference between the U.S. and Australian systems is the absence of formal negotiations and the lack of formal grievance mechanisms in Australia. However, it should be noted that the "paraphernalia" of compulsory arbitration "should not obscure the considerable degree of negotiation and conciliation which take place in Australian labor relations."

> The considerable growth of payments in excess of awards in recent years bears tangible testimony to the prevalence of negotiation. Many disputes which are formally recorded as having been processed by compulsory arbitration may have been handled by conciliation; just as many awards which formally express the arbitrator's ruling may embody a substantial degree of agreement by the parties. And, indeed, many awards are CONSENT awards expressing the translation of agreements {which have a doubtful legal standing under the common law} into awards which are legally binding on the parties.[8]

Whereas negotiation may find some expression in the Australian system, it appears that grievance resolution procedures are more difficult to incorporate into the system. One purpose of compulsory arbitration was to reduce the incidence of work stoppages. As the economic system of Australia has become more complex, the compulsory arbitration system as envisioned by the founders of the system seems to suffer from the lack of any formal way of resolving grievances. Lacking an accepted way of

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[7]Kneese, A., and Schultze, C., Pollution, Prices and Policy (Washington: Brookings, 1975), p. 116.

[8]Isaac, Compulsory Arbitration in Australia, p. 7.

grievance resolution, workers and their unions have increasingly used the strike as a way of expressing a grievance, as well as a way of speeding up the activity of an arbitration tribunal. As a consequence, the incidence of strikes is quite high, although the duration of strikes is usually shorter than is the case in the U.S.

> The importance of . . . . grievance issues as a source of strikes . . . brings to the fore one of the major shortcomings of the Australian compulsory system. . . . For practical purposes, no distinction is drawn between interest disputes and rights disputes. Although no clear distinction is possible between the interest and rights because the life of an award is effectively indeterminate, it is, nevertheless, possible to argue that while compulsory arbitration may have succeeded in reducing the duration of stoppages on interest type issues, it may have aggravated or at least been unable to cope with stoppages arising from grievance or rights type disputes.[9]

Niland, relying on information obtained from a survey, observes that:

> . . . the large majority of Australian strikes involves grievances arising within ongoing awards of agreements . . . . Almost half of all strikes . . . cited causes that, by their nature, are grievance intensive and arise mid-award agreement: management behaviour, demarcation, work format, sympathy, social-political and intra-union issues. It follows that strikes in Australia are fairly evenly distributed throughout the award or agreement period and are primarily protest or grievance in nature.[10]

Teachers in the Labor Relations System

It is within this context that Australian teachers*, including the N.S.W. teachers, carry on their union activities. Formed after the first World War, the N.S.W.T.F. was registered as a trade union in 1919. The federation sustained itself through the years until the second world war;

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[9] Ibid., p. 31.

[10] Niland, Jr., Collective Bargaining in the Context of Compulsory Arbitration: An Australian Dilemma. Paper presented to the 27th Congress of the Australian and New Zealand Association for the Advancement of Science, Hobart, May 12, 1976).

*In the Australian system, principals are "teachers."

after the 1950s it grew in response to increasing enrollments until it became the biggest teachers' union in Australia. Indeed, it is now among the largest unions on the registry.

In 1968, the N.S.W.T.F. staged its first strike, to the consternation of the people, the government, the Public Service Board, the Arbitration Court which ruled against the strike, and the Department of Education. For the most part, the teachers got what they struck for; the only loss appeared to be that of a day's pay. Since that time, the Federation has not hesitated to use the strike as a persuasive device.

But the indications are that teachers' unions use the strike as a means to force changes in or to remedy conditions promoted by existing awards. Lacking no better remedy than the strike, as is the case for most Australian labor unions, teachers in recent years have organized innumerable strikes, usually of one day's duration, and usually confined to a relatively small local area. A popular device in the early months of 1978 has been the use of carefully planned "working days" similar to the U.S. mode of "work to rule."[11] It should be noted that, over the years, the Australian system has been advantageous to teachers. Teachers' salaries have been increased dramatically over the years; their comparative status with other employee groups is at least as good as is the case in the U.S. The relative stability of teachers' salaries has been in keeping with the stability of wages generally.

One other Australian circumstance deserves attention. The importance of the "unit" in U.S. labor relations is not discussed in

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[11]"Armidale Teachers Vote for Industrial Action," The Armidale Express, June 19, 1978, p. 3.

Australian literature. The implications of "unit" and representative organizational relationships, however, are a part of the Australian scene. One troublesome problem for teacher unions is found in the fact that teachers, deputy principals, and principals are all included in the same organization, which, in Australia, amounts to being in the same unit. I talked with the Liaison Officer of the Canberra Teachers' Federation. When asked what he spent most of his time doing, he told me it was "keeping things cool between union members." For example, if a principal recommends dismissal of a teacher to the top authority, and the teacher contests the dismissal, the Federation is pledged to serve as advocate for the teacher. But the principal is also a member of the Federation. Is he no less deserving of the union's support? It is the union's intention to resolve the dispute as quietly as possible.

The final factor which complicates the Australian labor relations scene is the governance of education itself, alluded to early in this paper. Teachers in N.S.W. are hired by the Public Service Board (P.S.B.); their award is negotiated through the P.S.B. and legitimated by the Industrial Commission. But teachers are administered by the Department of Education. This is an arrangement which has been repugnant to teachers for some time. On August 10, 1976, a Working Party was commissioned to investigate, report and recommend on:

> (i) the present structure, organization and adequacy of educational services at all levels;
> (ii) suitable forms and structures of organization to meet the changing educational needs of the community, including the implications of establishing an Education Commission.[12]

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[12] Final Report of the Working Party for the Establishment of an Education Commission. Presented to the Minister of Education on 5 October 1977, p. 1

The Working Party gave explicit thought to the concept of "unity of management." When questions of employment and management were raised, the Working Party commented on ". . . the difficulty of distinguishing between employment and management, and of excluding industrial relations from a consideration of employment."[13] "Unity of management," in the words of the Working Party, is not provided in the existing structure:

> Under the Teaching Service Act, the Director-General has power to command and a right to control the manner in which work is performed--criteria that can be used to determine whether or not an employee-employer relationship exists. These two criteria alone are not conclusive evidence of an employer role. The power to determine salaries and conditions is a necessary criterion in the definition of an employer.

Any distinction between employment and management:

> . . . is false because there is a marked interdependence between conditions of work and educational policy. This interdependence is reflected in the relationship between "the industrial function" and "the {management} responsibility of an employer." We believe that one agency . . . must be responsible for educational policy, its formulation and implementation, and the employment of staff to carry out that policy.[14]

After discussing three possibilities, the Working Party concluded that:

> The two separate agencies {the Public Service Board and the Department of Education} each operating with a set of criteria developed to meet its specific and exclusive responsibility are inevitably forced into conflict--one antagonizes, the other frustrates. Improvements in the delivery of educational services can only be achieved by the amalgation of these responsibilities.[15]

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[13] The Second Interim Report of the Working Party For the Establishment of an Education Commission. Presented to the Minister of Education on 5 October 1977, p. 60.

[14] Ibid., p. 61.

[15] Ibid., p. 64.

The Working Party distinguishes between the skills of "educational leadership" and the skills of "employer." To provide the necessary complement of skills, the Working Party proposes the establishment of an advisory agency, composed of employee and employer representatives, responsible to the Commission. This is intended to provide for "close involvement" of the employees "in all aspects of personnel management." This Commissions Employment Services Agency (C.E.S.A.) is to have two parts: "one to act as an opponent to unions; the other to function as a set of representative standing committees to oversee personnel management."[16] The report goes on to note the importance of staff with skill in industrial relations as well as a knowledge of education for the personnel management part of the C.E.S.A.

When asked if the Education Commission was important enough to the N.S.W.T.F., that the necessary compromises would be made to get a change in governance, the President of the Federation assured me it was, and that compromises would be made.[17] The nature of those compromises is yet to be determined.

Some Speculations About the Future

Whereas the systems of labor relations in Australia and the U.S. are different, many economic and social conditions are similar: both countries are industrialized, with a background of agrarian values; private sector labor is highly organized; inflation is clearly evident; both are plagued by "balance of payments" problems; both suffer the consequences of inflation; both countries see their expansion in terms of

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[16]Ibid., pp. 67, 68.

[17]Interview with B. Manefield, June 16, 1978.

ever-increasing industrial production. There are differences which need to be considered in order to understand comparisons which might be made between the two countries: Australian public sector labor is much more highly organized and with a longer history of activity than is the case in the U.S. Australia's population is much less dense than is the case in the U.S., i.e., New York State has a population about equal to all of Australia. Australia's natural resources have not been as depleted as have America's. The economic system of Australia is much more controlled than in the U.S.; free enterprise and competition are not as strong a part of Australia's heritage as is the case in the U.S.

It is within the context of the latter conditions that speculations about Australian labor relations, especially labor relations in education, will be viewed.

One author makes reference to a condition predictive of change which I had noted in a journal article some years ago[18]: the impact of growing educational levels of employees. In brief, more eudcation leads to expectations of more control over one's activities. To use Niland's words:

> Change is brought about by events and fundamental changes . . . such as the impact of growing educational levels. That is, direct negotiation is increasing and will continue to increase, not because of a specific policy decision favoring its adoption, but because it caters better to the heightened taste for self-determination than does compulsory arbitration.[19]

One evidence of such a force is found in the efforts on the part of the N.S.W. Federation to support the N.S.W. Education Commission. The

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[18] Journal of Collective Negotiations in the Public Sector (Spring 1973).

[19] Niland, Collective Bargaining, p. 49.

establishment of the Commission will give the Federation a base for influencing educational policy far beyond its current possibilities. Under positive consideration is the prospect of a Commission made up of a chairperson, two government appointees, two parent representatives and four Federation representatives. Four out of nine is a marked change from no representation at all. The Federation has worked hard to influence the composition of the Commission. The President of the Federation, whom I interviewed, is confident of achieving that primary goal; he assured me the Federation has made, and will continue to make, the necessary compromises on lesser items of importance in order to achieve the important goal of four out of nine Federation representatives on the Commission.[20] The final hearing of the Working Party is scheduled for August; the Federation expects the Commission to become a reality soon thereafter. Given the political realities of Australia, "soon" may be many months away.

If one considers the changes in employment, administration and finance to be instituted under an Education Commission form of governance, the implications for change in relation to teachers are great. One might speculate that the implications of a single body, with authority to employ as well as manage, have not yet been clearly analyzed by the Australian education community. When established, the Commission will change more than just labor relations in N.S.W.; it will, at least, influence educational finance, school-community relations, Federation strategies.

The Federation, however, should not be viewed as other than a fairly

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[20] Interview with B. Manefield, Federation president, in Sydney, June 16, 1978.

conservative union. One of the reasons it wants to gain more control is to influence policy. To assume it will influence policy for more and more change is to deny the historical fact that unions, over time, tend to become more conservative and less radical. An interesting item in relation to this discussion is the "preference to unionists" clause in the current award. The Federation Handbook advises that the clause, in simple language, means:

> Applied to teachers in the N.S.W. system {the clause} meant that where two candidates for one position have equal qualifications then the financial member of the Federation should be given preference. Similarly where a position is declared redundant then the non-members should be laid off before members.[21]

It is assumed here that the Federation will use any new-formed base of power to influence policy in ways which meet membership expectations. It is further assumed those policies will be relatively conservative, at least in the sense that they do not detract in any discernible way from the security and authority of the union, or of teachers as a class.

If one brings the compulsory arbitration system of Australia and the collective bargaining system of the U.S. into focus, it is possible to speculate, broadly, about the advantages of both. There are circumstances when compulsory arbitration is appropriate, perhaps necessary. The U.S. found that to be the case during World War II. At the same time, collective bargaining and grievance mechanisms seem to fit better with democratic ideals than does compulsory arbitration. Both countries might profit from a departure from tradition and consider modifications which would make the two systems more alike than different. It can be

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[21] New South Wales Teachers Handbook, 1978, p. 7.

argued that the two systems, compulsory arbitration and negotiation, do not need to be mutually exclusive.

Australian literature has given some attention to that possibility. Niland comments that "A dual system, properly structured, accommodates the inevitable drift to direct negotiations, while preserving the arbitral sphere for those favoring it. Indeed, a bargaining sphere will provide an alternative for groups who want to use it."[22]

It can be speculated that a dual system will become a part of the Australian scene. The most compelling evidence is found in the widespread practice of informal negotiation. Several authors comment on that growing trend. At least one gives partial explanation: "Parties have, as a result of longer and longer delays in the arbitration process, increasingly felt the need to work out temporary terms and conditions of employment that become 'consent awards' upon ratification by the arbitrator. Thus collective bargaining is becoming a necessary part of the larger conciliation and arbitration process."[23]

Martin offers further evidence of the growing trend:

> In many areas of non-governmental employment "over-award" payments negotiated by "pure" bargaining are quite common. Such payments are not normally evidenced by a formal written contract. Usually there is no more than an exchange of letters. . . . Where unions and management in Australia desire legally enforceable arrangements, they usually process the matter through the arbitration system . . . by award or certified agreement.[24]

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[22]Niland, Collective Bargaining, p. 60.

[23]Caiden, Public Employment Compulsory Arbitration, p. 130.

[24]Martin, "Australian Professional and White Collar Unions," Australian Labour Relations, (eds.) J. Isaac and Ford (Melbourne: Sun Books, 1966), p. 370.

As has been the case in the U.S., Australian public sector employees tend to follow patterns set by private sector labor relations. Private sector labor relations are highly formalized. Without more adequate formal processes to meet the needs of employees, including teachers, one can expect informal practices to emerge. Those informal practices will move toward formalization; as soon as they fail to meet perceived needs, they, in turn, will be set aside by new informal practices. That will continue to happen in Australia, as it will in the U.S. It is that evolving aspect of labor relations in a changing world which makes the study of labor relations fascinating, and the involvement in labor relations so frustrating. It is this contrast between the need for continuity and the thrust for change which will characterize employer-employee relations in both countries for the future. It is to meet that sometimes disconcerting future that programs in educational administration should give attention. Generally speaking, neither Australian nor American educators seem convinced of that.

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